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No. 06-603

Supreme Court, U.S.
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In The Supreme Court of the United States

IRVING N., DAWN N., AND SANDRA N.,

Petitioners,

v.

RHODE ISLAND DEPARTMENT OF CHILDREN, YOUTH, AND FAMILIES,

Respondent.

On Petition For A Writ Of Certiorari To The Rhode Island Supreme Court

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

Petitioners Irving and Dawn N. challenge the decision of the Rhode Island courts to terminate their parental rights to their daughter, Kayla. They contend that the judgment of termination discriminated against them on the basis of disability in violation of Title II of the Americans with Disabilities Act, 42 U.S.C. § 12131 *et seq.* (Title II). In affirming that judgment, the Rhode Island Supreme Court specifically held that "a termination-of-parental-rights proceeding does not constitute the sort of service, program, or activity that would be governed by the dictates of the ADA" (Pet. App. 11a). Our petition for writ of certiorari (at 8-12) showed that this holding contradicts the plain text of Title II and conflicts with this Court's decision in *Pennsylvania Department of Corrections v. Yeskey*, 524 U.S. 206 (1998). The Rhode Island Supreme Court's holding also implicates a widespread confusion among state courts regarding application of Title II to termination of parental rights proceedings, and it conflicts with the holding of at least six federal circuits that Title II applies to everything a state government does (Pet. 12-19).

Respondent acknowledges that "[i]t is undisputed that the state courts have taken different positions regarding whether and how Title II of the ADA applies to termination of parental rights proceedings" (Opp. 21). And although Respondent contends that "the ADA does not apply to TPR proceedings" (Opp. 20), it does so only by ignoring key language of Title II. Title II applies to all "activities" of a state government entity, and it prohibits all disability-based "discrimination" by such an entity. 42 U.S.C. § 12132. That language plainly covers discrimination in the termination proceedings themselves. Respondent also asserts that because state-law "reasonable efforts" requirements may

apply to family reunification services often provided before termination, there is no reason to apply Title II to the termination proceeding (Opp. 21). But that assertion ignores the central basis for Petitioners' claims – that the state courts' judgment of termination *itself* discriminated against Irving and Dawn on the basis of disability. In the end, the brief in opposition only underscores the confusion in the lower courts and the errors in the Rhode Island Supreme Court's decision.

A. The Decision of the Rhode Island Supreme Court Conflicts with Title II's Plain Text and This Court's Decision in *Yeskey*

1. Title II provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. This Court's decision in *Yeskey* held that courts must give effect to that broad language and may not carve areas of state government out of the statute's coverage. *See Yeskey*, 524 U.S. at 209-212. Title II prohibits discrimination in termination of parental rights proceedings, which are at the very least "activities of a public entity" (*see* Pet. 9-10). Respondent argues that Title II does not reach these proceedings, but its arguments ignore the plain text of the statute.

First, Respondent contends (Opp. 12-14) that termination of parental rights proceedings are not "departments" or "agencies" of state government and therefore do not come within the statutory definition of "public entity." But the relevant question is not whether the *proceedings* are a "public entity" – just as the relevant question in *Yeskey*

was not whether Pennsylvania's Motivational Boot Camp program was a "public entity." Rather, the question is whether the state court that terminated Irving and Dawn's parental rights is a "public entity" – and it clearly is. The ADA does not limit the definition of "public entity" to "departments" and "agencies," but reaches "any . . . other instrumentality of a State or States or local government." 42 U.S.C. § 12131(1)(B). If Title II did not reach the actions of state courts, this Court's decision in *Tennessee v. Lane*, 541 U.S. 509 (2004), which upheld Title II as applied to judicial proceedings, would make no sense.

Second, Respondent misreads Title II to apply only when an individual is " 'excluded from participation' or . . . 'denied the benefits of the services, programs or activities of a public entity' " (Opp. 14, quoting 42 U.S.C. § 12132). But again, Title II extends far beyond exclusion from participation and denial of benefits; it also prohibits states from "subject[ing qualified individuals with disabilities] to discrimination." 42 U.S.C. § 12132. Whether or not the state court excluded Irving and Dawn or denied them a benefit (and denying them the right to parent their child certainly can be characterized as both), Irving and Dawn clearly contend that the state court subjected them to discrimination. That is all that is necessary to invoke Title II's coverage.

2. Respondent appears to draw a distinction between termination of parental rights proceedings (which it contends are not covered by Title II) and the family reunification services that state law often requires before termination may be sought (which it concedes are covered by Title II) (Opp. 16-17, discussing *Adoption of Gregory*, 747 N.E.2d 120 (Mass. 2001)). Thus, while Respondent insists that parents may not raise the ADA as a "defense

in termination proceedings" (Opp. 21), it suggests that Irving and Dawn could have raised their Title II challenges (to reunification services only) in a separate action. The Rhode Island Supreme Court did not rely on that proceedings/services distinction. Nor did it even cite *Gregory*, the case to which Respondent points as establishing that distinction.

In any event, Respondent's asserted distinction finds no support in Title II, which applies to any "activity" of state government. 42 U.S.C. § 12132. As we showed in our petition (at 9), termination of parental rights proceedings themselves – and not just the services provided prior to initiation of those proceedings – meet the standard definitions of the term "activity." Although Respondent cites lower-court cases that, by *ipse dixit*, declare termination proceedings not to be "activities" (Opp. 18-23), neither those cases nor Respondent's brief in opposition offer any established definition of "activity" (or even any newfangled and made-up definition of "activity") that would exclude those proceedings from Title II.

In many instances, it is the termination proceeding – and not any services provided (or not provided) prior to the initiation of that proceeding – that discriminates on the basis of disability (*see* Pet. 20-21). When, for example, a state court terminates a parent's rights based on stereotypes about the parenting abilities of people with a given disability, it is engaging in discrimination that plainly comes within Title II's text. But under Respondent's reading, the ADA cannot reach that discrimination.

Two of Petitioners' three Title II claims relate entirely to the conduct of the state courts: (1) the claim that the key testimony supporting the decision to terminate rested

on stereotypes about the parenting skills of people with mental retardation (*see* Pet. 8); and (2) the claim that the state courts refused to consider whether permitting Sandra N. to adopt Kayla would be a proper "reasonable modification" under the ADA (*Id.*). And the third claim – that the state's reunification services were not properly tailored to Irving and Dawn's disabilities (*Id.*) – also turns crucially on the state courts' conduct in the termination proceedings. Irving and Dawn did not seek parenting services in the abstract. To the contrary, their reunification-services claim is that the termination of their parental rights is unlawful under Title II because the state courts issued their judgment of termination even though the state never gave Irving and Dawn sufficient disability-tailored parenting services. That claim also did not ripen until the termination proceedings.

For these reasons, Respondent is incorrect to assert (Opp. 17) that Petitioners somehow waived their Title II claims by failing to raise them *prior to the initiation of the termination proceedings*. The Rhode Island courts did not rule that Petitioners waived their Title II claims, nor would such a ruling be supportable. Because Petitioners challenge the initiation of – and decisions made in the course of – the termination proceeding itself, their claims could not have been raised earlier.

Moreover, the prospect that parents like Irving and Dawn could assert their Title II claims in a *subsequent* proceeding is illusory. In Rhode Island and most other states, a judgment terminating parental rights is "irrevocabl[e]." *In re Kyle S.*, 692 A.2d 329, 334 (R.I. 1997). Accordingly, Irving and Dawn could not go to state court to attack the judgment collaterally on Title II grounds. And they could not go to federal court to do so. Because they

would be "i[illegible]ng district court review and rejection of" the state-co[illegible] judgment, the *Rooker-Feldman* doctrine would bar jurisdiction. *Exxon Mobil Corp. v. Saudi Basic Industries Corp.*, 544 U.S. 280, 284 (2005). And even if that hurdle could be overcome, the "domestic relations" exception would bar jurisdiction. *See Lehman v. Lycoming County Children's Services Agency*, 458 U.S. 502, 513-514 (1982) (federal district courts lack "jurisdiction to relitigate state custody decisions"). The only meaningful time at which parents can challenge the termination of their parental rights is in the termination proceedings themselves.

B. This Case Implicates Persistent Confusion in the Lower Courts

Respondent asserts (Opp. 21-28) that there is no conflict in the lower courts on the question presented. Even if that were true, certiorari would still be appropriate given state courts' persistent refusal to apply Title II according to its plain text. *See Lexecon v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998) (granting certiorari where lower courts unanimously read a federal statute in conflict with its plain text).

In any event, Respondent does not dispute the basic point: If this case had arisen in Iowa or Washington, Petitioners' Title II claims would have been considered on the merits, in accordance with the principle, adopted by at least six federal circuits, that Title II applies to everything a state does. But because the Rhode Island Supreme Court chose to join the 15 other states that hold the ADA inapplicable to termination of parental rights proceedings, the

state courts did not even consider Petitioners' claims (*see* Pet. 13-19).

C. The Question Presented is Exceptionally Important to Petitioners and to Parents with Disabilities – and Their Children – Across the Nation

The question presented is exceptionally important to the 6.9 million custodial parents with disabilities in the United States – and to their children (Pet. 19-22). An order permanently and irrevocably terminating parental rights is one of the most severe infringements on liberty a state can impose. Commentators have repeatedly observed that there is widespread discrimination against parents with disabilities in parental-rights termination proceedings. The amicus brief submitted on behalf of the American Association on Intellectual and Developmental Disabilities, the Arc of the United States, and other organizations and law professors highlights the disturbing extent of that problem.

1. Respondent suggests that it makes little difference whether Title II applies to termination proceedings, because states have a duty (under state law) to "provide reasonable efforts to reunify a parent and a child in certain situations" before terminating parental rights (Opp. 21). It points (at 22-23) to a Michigan ruling that a court cannot find "reasonable efforts" if the state's reunification services violated the ADA. *In re Terry*, 610 N.W.2d 563, 570 (Mich. App. 2000). But that case conflicts with the decision under review. Unlike the Michigan Court of Appeals in *Terry*, the Rhode Island Supreme Court refused to consider whether the state's provision of reunification services violated Title II (*see* Pet. App. 10a-13a). The Rhode Island Family Court's opinion was explicit on this

point: Because that court concluded that Title II "is not applicable," it specifically rejected the proposition that the state was required to make "special efforts" that would take account of Irving and Dawn's mild mental retardation (*Id.* at 40a). The Rhode Island courts' "reasonable efforts" determination was therefore explicitly divorced from any ADA requirements.

For that reason, Respondent is wrong to contend (at 27-28) that, because the Rhode Island courts found "reasonable efforts" at reunification, "the Americans with Disabilities Act was not violated." The state did, for the first nine months of Kayla's life, provide Irving and Dawn with parenting services through Spurwink of Rhode Island that were geared toward people with intellectual disabilities (*see* Pet. 2-3). But after it canceled Spurwink's contract to provide services to them, the state referred Irving and Dawn to a series of programs, none of which were tailored toward parents with disabilities (*Id.* at 3-5). By the time the state filed its petition for termination of parental rights, a year had passed since Irving and Dawn had received any services that took account of their disabilities (*Id.* at 5). Even if the Rhode Island Supreme Court was correct to conclude that the state provided "reasonable efforts" at reunification under state law, there is powerful reason to believe that the state violated Title II by terminating Irving and Dawn's parental rights without providing "reasonable modifications" that took account of their disabilities.

Even if state-law "reasonable efforts" requirements did apply the ADA's standards to the state's *reunification services*, that would be no substitute for applying Title II to the termination proceedings directly. For one thing, as Respondent acknowledges (at 21), the state-law duty to

provide "reasonable efforts" and reunification services applies only "in certain situations." More important, a judgment terminating parental rights might discriminate on the basis of disability for reasons having nothing to do with the state's reunification services. For example, when a state court terminates parental rights based on a stereotype about the parenting skills of people with disabilities, it discriminates in a way that the "reasonable efforts" requirement cannot capture.* Our petition showed (at 20-21) that stereotype-based discrimination is pervasive – and this case involves stereotype-based discrimination in the termination decision (*see* Pet. 8).

2. Respondent asserts (at 29) that "prolonging this litigation" will have an adverse effect on Kayla. But here – unlike in the case it cites – Respondent points to absolutely no evidence of such an adverse effect. *Cf. Castorr v. Brundage*, 459 U.S. 928, 930 (1982) (Stevens, J., respecting denial of certiorari) ("The record strongly suggests that prolongation of this litigation might have a serious adverse effect on the emotional and physical health of the child."). A state cannot terminate parental rights in violation of federal law and then foreclose an appeal simply by making unsupported claims that this Court will do harm by enforcing that law.

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* The "reasonable efforts" requirement also cannot capture those reasonable modifications, like Petitioners' request that Sandra be permitted to adopt Kayla, that would not lead to family reunification. The state courts rejected that request on state-law grounds without ever considering whether it might be justified as a reasonable modification (*see* Pet. App. 17a-19a). Contrary to Respondent's suggestion (at 28-29), that state-law determination says nothing about whether Petitioners' Title II claim is viable.

Here, federal law is clear: Title II of the ADA provides that a state may not discriminate on the basis of disability in any of its activities. But the Rhode Island Supreme Court, in accord with courts in 15 other states, held that Title II does not apply to a state activity that implicates one of the most powerful interests of individuals with disabilities: their legal right to be parents to their children. The question presented is of the highest importance to Petitioners and to parents with disabilities across the Nation, as well as to their children.

CONCLUSION

For the foregoing reasons and the reasons set forth in our petition for writ of certiorari, the petition for writ of certiorari should be granted.

Respectfully submitted,

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